IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB - REGISTRY OF MWANZA)

AT MWANZA

LAN D CASE NO. 30 OF 2022

WINFRIDA LAZARO ZABRON @ WINIFRIDA HUHANGWA (*Administratrix of the Estates of the Late Lazaro ZABLON MUHANGWA*).....PLAINTIFF

VERSUS

RYAGA YUDA RYAGA..... 1ST DEFENDANT
MAGAIGWA CHACHA KEBILE..... 2ND DEFENDANT
ROBERT MBELWA..... 3RD DEFENDANT
CHRISTINA KIYOMBO..... 4TH DEFENDANT
ILEMELA MUNICIPAL COUNCIL..... 5TH DEFENDANT
ATTORNEY GENERAL..... 6TH DEFENDANT
SOLICITOR GENERAL..... 7THDEFENDANT

RULING

May 4th & 29th, 2023

Morris, J

The suit above by Winfrida Lazaro Zabron against the defendants does not seem to commence with a smooth take off. Whereas the 1st defendant raises a preliminary objection (PO) that the suit is **time barred**; the 5th, 6th and 7th defendants challenge it preliminarily for allegedly **lacking the notice of intention to sue** one of them.

I ordered the two limbs of PO to be argued by way of written submissions. The filing pattern thereof was set for submissions in chief; reply submissions; and rejoinder submissions on May 17th, 2023; May 22nd, 2023; and May 25th, 2023 respectively. Respective submissions by the 5th -7th defendant and the plaintiff were filed as scheduled. However, the 1st defendant filed his main submissions two days after the set time; without the leave of the court. Nevertheless, he was compliant with the timeline scheduled for the rejoinder submissions. I will start with this aspect of non-observance of the court order by the 1st defendant.

Not in dispute are four matters. **First**, that the timeframe was set in the presence of all parties. **Second**, the 1st defendant filed his main submissions out of the prescribed time. **Third**, rejoinder submissions were filed timely. **Four**, the principle of law that, failure to file written submissions amounts to non-appearance for prosecuting or defending the case. Midst of such undisputed matters, the court has rivalry invitations from each side of the case. On his part, the plaintiff's advocate (Mr. Godfrey Basasingohe) prays that the court should apply the orthodox principle: to dismiss with costs the 1st defendant's PO for want of prosecution.

Opposed to the foregoing plea, advocate Elias Hezron for the 1st defendant implores me to take a more generous route thereby condoning his lateness. He advances various grounds to back up his request. They are contained in the so-called 1st defendant's rejoinder submissions. I undertake to state them. **One**, his was the first noncompliance. **Two**, his lateness did not prejudice the plaintiff. **Three**, the objection relates to court's jurisdiction; and **four**, the lead counsel was out of Mwanza City.

From the outset, I dare state that, the most intriguing interrogation remains to be the appropriateness of the rejoinder submissions in the absence of a valid main submissions. That is to say, is a party allowed to file rejoinder submissions over an emptiness? It is, in my view, incorrect. It is as unscientific as driving a turned-off car without igniting it first. In appreciation of this blatant fact, the 1st defendant's counsel is trying to seek refuge from the urgency of this matter. He claims that if this matter was not set for ruling the applicant "would have applied for extension of time" so as to file his main submissions.

The foregoing reality notwithstanding, the counsel went ahead and filed the envisaged submissions in chief without first seeking to enlarge the time given to him. In other words, he subscribes to the fact that what he purports to condone is non-existent. It is not clear why, instead of filing

the purported submissions, the counsel did not file an application for extension of time.

Be as it may, if the court was to accept his condonation-appeal above, another obvious threefold-huddle will still hold the 1st defendant back. **Firstly**, the document in which the grounds are contained is superimposed on a nullity. That is, it is equally improper before the court. **Secondly**, it is a final document which can not be replied to by the opposite party. That is, the raised grounds would call for the response from the opposite party. Lest, the latter's fundamental right of being heard will be transgressed. **Thirdly**, it raises matters of fact which would otherwise call for evidence to prove them.

Law holds it a settled principle that, submissions are not evidence. That is, statements or submissions from the bar/parties are essentially the reflection of the general opinion over the parties' case. See, for instance; ***the Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman, Bunju Village Government & 11 Others***, CoA Civil Appeal No. 147 of 2006; ***Bish International B.V. & Rudolf Teurnis Van Winkelhof v Charles Yaw Sarkodie & Bish Tanzania Ltd***, Land Case No. 9 of 2006; and ***Rosemary Stella Chambejairo v David Kitundu Jairo***, CoA Civil Reference No. 6 of 2018 (all unreported).

Further to all what is expressed above, in this whole matter, the 1st defendant is trying to blow hot and cold. His objection is married to time limitation. That is, he is condemning the plaintiff to have failed to observe time within which to take appropriate action. Incongruently, he hunts for dismissal of the suit allegedly filed out of time, while using the time-barred proceedings.

After having elucidated the 1st defendant's tardiness, as I have done in details above; the Court is inclined to briefly state the consequence thereof. In the interest of brevity and coherence, I will not try to reinvent the wheel. Recurrently, courts hold that by neglect or failure to file his written submissions, the party volunteers not to prosecute own case. Reference is ***National Insurance Corporation of (T) Ltd & Another v Shengena Limited***, CoA Civil Application No. 20 of 2007; ***Patson Matonya v The Registrar Industrial Court of Tanzania & Another***, CoA Civil Application No. 90 of 2011 and ***Godfrey Kimbe v Peter Ngonyani***, CoA Civil Appeal No. 41 of 2014 (all unreported). From the last case, the below excerpt caps it all.

> *"In the circumstances, we are constrained to decide the preliminary objection without the advantage of the arguments of the applicant. We are taking this course*

because failure to lodge written submissions after being so ordered by the Court, is tantamount to failure to prosecute or defend one's case."

It is cardinal principle that submissions filed out of time need be disregarded even if they carry merit. See, for instance the cases of ***Mariam Suleiman v Suleiman Ahmed***, Civil Appeal No. 27 of 2010; and ***Said Abdallah Kinyanyite v Fatuma Hassan and another***, Civil Appeal No. 87 of 2003 (both unreported). Consequently, the court hereby dismisses the 1st defendant's preliminary objection for want of prosecution.

I now turn to the second limb of the PO. As pointed out above, the 5th through 7th defendants raised the joint PO that the plaintiff filed the suit without serving the 5th defendant with the statutory notice first. Submitting in support of the PO, Mr. Patrick Muhere, learned State Attorney for the respondent argued that, serving the subject defendant with the notice is compulsory. He cited sections 6(2) and (3) of ***the Government Proceedings Act***, Cap 5 R.E. 2019; and 106(1)(a) of ***the Local Government (Urban Authorities) Act***, Cap 288 to bolster his argument.

In addition, the court was referred to the cases of ***Musa Ngang'wandwa v Chief Japhet Wanzagi & 8 Others*** (2006) TLR 351; and ***Emmanuel Titus Nzunda v Arusha City Council & 4 Others***, Land Case No. 28 of 2020 (unreported). Both cases bear it a concurrent holding that, a suit filed without serving the Government (both central and local) with the 90-day notice is incompetent.

Applying the above legal requirement to the present suit, the learned State Attorney contended that the plaintiff's allegation that the 5th defendant refused to affix his signature and stamp on the plaintiff's copy of the notice is untrue. According to him, such asseveration is not in the plaint nor supported by process server's affidavital deposition thereof. That said, a corresponding prayer followed such submissions. The Court was requested to strike the suit out for want of statutory compliance.

On the part of the plaintiff, her advocate firmly submitted that the suit was properly filed. To him, the notice was written on July 17th, 2020 and served upon the respective defendants a day after. He added that, a copy thereof was then referred to and annexed to the plaint. To justify the plaintiff's compliance, the counsel argued that the said defendants formally acknowledge service except the 5th defendant who simply signed her dispatch book. He, thus, challenged the PO on two bases: that, said

defendants are demanding proof of service which turns the objection into an evidential-based point instead of a pure point law.

Further he submitted that, so long as the defendants did not specifically deny the notice being served upon them in their joint written statement of defence (WSD); they are not justified to challenge the otherwise constructively admitted pleading of the plaintiff. Apart from the cases of ***Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors*** [1969] EA 696; and ***Aggreko Energy Rentals (T) Ltd v Cata Mining Co. Ltd,*** Comm. Case No.5 of 2021 (unreported); the plaintiff's counsel cited Order VIII Rule 5 of ***the Civil Procedure Code***, Cap 33 R.E. 2019 to buttress his argument.

I have impassively considered the record and rivalry submissions of the two sides of the case. The Court is now required to determine the competence of the suit on the basis of the statutory notice to the respective defendants. Before doing that, however, I feel inclined to state that though jointly filed, the PO relates to the 5th defendant only. That is, the other two defendants do not join any issue with the plaintiff in terms of service of the notice. Further, it is apparent on record that the present suit involves almost all parties who were in Land Case No. 21 of 2021 which was struck out by this court on March 15th, 2022.

It is correct, as submitted by the State Attorney, that a person suing the government and/or its organs; he must serve the appropriate authority with the notice of his intention to sue. Indeed, such notice should be served to the government not less than 90 days preceding the actual institution of the suit. It is the law. Thus, a party cannot legally dispense with such obligatory procedure. Hence, a suit so filed without compliance thereof, it becomes premature. It fails preliminarily.

I am also mindful of the fact that the subject notice is an integral part of the jurisdiction. That is, in its absence, the case is rendered as incompetent. That is, the notice is intrinsically a jurisdictional issue because the court, as the general rule, cannot adjudicate on a suit against the Government unless the latter put on notice for three months. Read sections 6(2) and (3); and 106(1)(a) of ***the Government Proceedings Act***; and ***the Local Government (Urban Authorities) Act***, respectively. Further, the notice signifies that parties have gone to court as a last resort.

Notwithstanding the foregoing compulsive dictates of the law, whether or not the notice alleged in the pleadings is served on the appropriate parties, is a tricky matter. As is the case in the present suit, when one person alleges to had complied with the law and attaches a

copy of the notice on his/her pleadings; and the opponent party disputes such allegation, the court cannot guess who between the two is truthful. In my considered view, it would be unsafe for the court to speculate which side should be believed. Thus, evidence to prove each side's version of averment becomes inevitable.

In the case at hand, paragraphs 18 of the plaint and the corresponding paragraph 10 of WSD state as follows:

> "*18. That, the Plaintiff had made several approaches in a* ***quest for amicable settlement*** *with the defendants but it was all in vain. Not even when they were ordered to compensate her in lieu of repossession by the Ward Tribunal of Ilemela. The* ***statutory notice*** *annexed herewith and marked 'WM 6' for ease of reference.*"

> "*10. That the content of* ***paragraph 18*** *of the plaint* ***is disputed****, as the 5th, 6th and 7th defendants state that we do not know anything concerning compensation and compensation cannot be given to someone who doesn't own the said land.*" (Bolding for court's emphasis).

In civil procedure law, when a fact is pleaded by one party to a suit and disputed by the other, each party must marshal evidence to prove

the respective averment. Proving and disproving such fact is undertaken during the hearing of the suit. Therefore, it gets out of the realm of preliminary points of objection. That is, a PO must constitute points of law; no more [***Mukisa Biscuits' case*** (*supra*) followed].

From the quoted paragraphs above, the plaintiff alleges to had engaged the defendants in amicable settlement discussions. The opponent is disputing such cordial gesture from her. It is a matter of controversy which can be determined conclusively upon procurement and admission of evidence during the trial. This position is further evidently cemented by the submissions of the opposing parties. Each side is trying to sneak in the court's record, arguments in lieu of evidence that the plaintiff was or was not compliant.

In line with the foregoing contention of parties, the defendants' attorney even demands that the plaintiff should have produced affidavits or a copy of the dispatch book with name, title and address of the person who received it to prove service of notice. Hopefully, the discontented party will thereupon demand to cross examine such person in order to establish the veracity of the allegations. In my view, that will amount to stretching too much the elasticity of the PO. One cannot justifiably give such details at the present preliminary stage of the matter.

In view of the conclusions and reasons I have reached at and given above, the PO is lacking merit. It is inept. Accordingly, I overrule it. For avoidance of any doubt, the 1st defendant's PO is dismissed for want of prosecution and the 5th, 6th and 7th defendants' objection is overruled on the basis of being barren of merit. Parties to bear own costs.

It is so ordered.

C.K.K. Morris

Judge

May 29th, 2023

Ruling is delivered this **29th** day of **May 2023** in the presence of Winfrida Lazaro Zabron (plaintiff); and Advocate Deya Outa for the 1st defendant but also holding brief of Advocate Kevin Mutatina for the 2nd defendant; Advocate Rosemary Makori for the 3rd and 4th defendants; and Patrick Muhere, learned State Attorney for the 5th, 6th and 7th defendants.

C.K.K. Morris

Judge

May 29th, 2023